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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN JOHN HOGREFE,

Defendant and Appellant.

2d Crim. No. B279107  
(Super. Ct. No. 2014033048)  
(Ventura County)

Kevin John Hogrefe appeals from the judgment after a jury convicted him of second degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a); count 1) and fleeing the scene of an accident involving a death (Veh. Code, § 20001, subd. (b)(2); count 2). The trial court sentenced him to 15 years to life on count 1 and a concurrent three-year term on count 2.

Hogrefe contends: (1) his change of venue motion was improperly denied; (2) there was insufficient evidence to

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

support the murder conviction; (3) evidence of his prior juvenile offense should have been excluded; (4) remand is required to allow the parties to present evidence related to a youth offender parole hearing pursuant to section 3051; and (5) various fines and fees were imposed without a finding of his ability to pay. We remand for an evidentiary hearing to preserve evidence relevant to a future parole hearing and to allow Hogrefe to request an ability to pay hearing on the court security and criminal conviction assessment fees. In all other respects, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

In October 2014, Hogrefe drove to a sports bar in Camarillo and stayed from 7:00 p.m. to 12:30 a.m. He drank six bottles of Coors Light and “more than one” 22-ounce IPA draft beers. Towards the end of the night, he was slurring his speech, falling asleep at the bar, and finishing other people’s drinks after they left. When the bartender asked Hogrefe if he was driving, he said “no” in a tone that suggested it was “stupid” for the bartender to ask and said he was walking.

Hogrefe left the sports bar and walked to another bar. The bartender at that bar knew Hogrefe since elementary school and realized he was drunk when he did not recognize her. She gave him an empty glass, and another patron poured Hogrefe beer from his pitcher.

Hogrefe began stumbling and acting “overly friendly” with people at the bar. When customers complained, the bouncer escorted Hogrefe outside and told him to leave. Hogrefe became upset and tried to get back in the bar. When the bouncer activated his Taser as a warning, the bartender intervened and told Hogrefe to leave. He agreed and left.

Around 1:00 a.m., Ventura County Sheriff's Deputy Eugene Kostiuchenko conducted a traffic stop on the U.S. Highway 101 northbound on-ramp on Lewis Road. Kostiuchenko parked on the shoulder of the on-ramp. Deputies Francis Valdez and Anthony Sanders also reported to the scene and parked about 15 to 20 feet behind Kostiuchenko's car.

After the traffic stop, Valdez got back into the driver's seat of the car. He saw Hogrefe's car heading down the on-ramp toward their direction. Hogrefe's car came "about six inches" from Valdez's side mirror, causing Valdez to physically recoil. Valdez heard a loud thump and saw Kostiuchenko's side view mirror and debris fly up in the air. Hogrefe accelerated toward the highway.

Valdez and Sanders pursued Hogrefe. As they passed Kostiuchenko's car, Sanders saw Kostiuchenko's body covered in blood on the ground. Sanders broadcasted that the "deputy is on the ground" and that they were in pursuit of the hit-and-run driver. As Valdez and Sanders passed the Las Posas exit, they saw Hogrefe's car stuck in ice plants next to the off-ramp. Sanders broadcast this information.

Two other deputies were the first to approach Hogrefe's car. Hogrefe had bloodshot watery eyes, a glazed stare, and dilated pupils. He was swaying inside the car, smelled of alcohol, and was mumbling his words. The deputies escorted him to the patrol car, and he fell asleep once inside the car. One of the deputies noticed that the passenger's side of Hogrefe's car and the windshield were smashed in. There was brain matter spattered on the side, roof, and inside the car. At the Lewis Road on-ramp, another deputy found Kostiuchenko's body about 30 feet in front of his car. Kostiuchenko was dead.

California Highway Patrol (CHP) Officer Matthew Winter reported to the Las Posas location and interviewed Hogrefe. Winter noticed a “strong odor of alcohol” and that Hogrefe’s eyes were “extremely red and watery.” Hogrefe told Winter he felt the effects of alcohol but thought it was safe to drive. He said that as he drove down the Lewis Road on-ramp, he was “mesmerized” by the patrol lights and “gravitated towards” them “even though he knew he shouldn’t.” He was aware he hit the patrol car, but did not stop because he was scared. He denied seeing Kostiuchenko.

Winter conducted a horizontal gaze nystagmus test on Hogrefe. All six clues indicated that Hogrefe was intoxicated. Winter attempted to conduct standing field sobriety tests, but Hogrefe said he was unable to stand. Winter arrested Hogrefe and took him to a hospital for a blood test.

The blood alcohol test was administered at 3:32 a.m. Hogrefe’s blood-alcohol concentration (BAC) level was 0.23 percent. A forensic specialist later opined that Hogrefe was driving impaired and that his BAC was about 0.25 percent at the time of the incident.

CHP Officer Scott Peterson conducted a recorded interview of Hogrefe at the hospital. Hogrefe recalled that he had not slept well the night before and did not eat dinner. He said he drank six or seven beers.

When asked about the BAC legal limit for driving, Hogrefe replied that it was 0.08 percent in California. Hogrefe said that laws prohibiting drunk driving “makes sense,” because “[y]ou’re not driving normal as you should be” and “[y]ou can hurt people.” He said he usually made arrangements to get home when he drinks because he did not want to risk a DUI and

because “it’s not safe. . . . [f]or me and other people.” When asked if he ever thought that an accident could happen when he was drinking, Hogrefe answered “yeah,” and admitted that his biggest fear was causing “death.”

Peterson asked Hogrefe why he did not make other arrangements to get home. Hogrefe responded that he did not want to be a nuisance to anyone and did not have money for a taxi. When asked if he “figured [he]’d just chance it,” Hogrefe agreed.

Peterson asked Hogrefe about a prior DUI offense that occurred in Nevada in June 2013. Hogrefe recalled driving home early in the morning and “thought [he] was fine, but [he] fell asleep.” He did a breathalyzer test and was over the BAC legal limit. He went to jail and was convicted of reckless driving. He took an online DUI course.

When asked about the course, Hogrefe said the instructor talked about “drinking and driving and the consequences.” He said the class taught “how driving under the influence . . . can kill people, you can hurt people. Even if it doesn’t kill people, you know, it can ruin people’s lives.” He described a video in which people spoke about how their lives were affected by drunk drivers. He said the video “stuck with” him and remembered one story of a man who was paralyzed after being hit by a drunk driver.

Hogrefe also told Peterson that he was arrested for a DUI when he was 17 years old. He was at a bonfire when officers showed up as he was getting ready to leave. He was not driving the car, but he had the keys in the ignition.

Officers searched Hogrefe’s phone and found several text messages from April 2013 to July 2014, which showed

Hogrefe communicating with his friends and family about drinking and driving. In multiple texts, Hogrefe's friends and family warned him not to drink and drive. His sister wrote that if he ever needed a ride, either she or her friend Ashly would come and get him or he should take a cab. Ashly wrote: "Let us be your sober drivers. Any hour, if you need it." Hogrefe's best friend also testified that he and his mother had a standing offer with Hogrefe to give him a ride home if he ever needed one after drinking. They had given Hogrefe a ride once or twice in the past. Other text messages showed Hogrefe asking for a ride or making arrangements to get a ride. On the day of the crime, Hogrefe texted a friend, but did not ask for a ride.

There were also text messages in June 2013, days after the Nevada incident. Hogrefe texted his brother and a friend that he fell asleep while driving. He told his friend he got into a car accident, failed a breathalyzer test, and got a DUI. Hogrefe wrote: "Yeah, it sucks, but I fell asleep at the wheel, so I'm glad I didn't hurt anyone or myself." Hogrefe told his friend that this was a "[w]ake-up call."

### ***Prior Nevada Offense***

At trial, the prosecution presented evidence of Hogrefe's June 2013 DUI offense. Early in the morning, Hogrefe was driving on a highway outside of Las Vegas when he hit a truck from behind. The impact of the collision caused the truck to spin out and almost hit the median wall before rolling off the side of the road. Hogrefe's car rolled over before stopping in the middle of the highway.

A responding officer interviewed Hogrefe at the scene. The officer testified that Hogrefe had bloodshot eyes and smelled of alcohol. Hogrefe said he was in Las Vegas all day and

did not sleep in two days. He admitted he fell asleep at the wheel and “put other people’s lives in jeopardy.” Hogrefe told the officer he drank a “few” beers at 2:00 p.m. the day before. The officer conducted field sobriety tests, including a preliminary breathalyzer test. Hogrefe’s BAC was 0.186 percent. A forensic specialist opined that his BAC at the time of the incident was 0.20 percent and that he was impaired when he was driving.

Hogrefe was convicted of reckless driving. The court ordered him to complete a DUI course and a victim impact course as a part of his sentence.

### ***Defense Evidence***

The program director for LRS Systems traffic school testified that he had record of Hogrefe completing the “Nevada DUI Level 1” online course. The course consisted of eight quizzes, one of which dealt solely with drinking and driving, and a 30-question final exam that included questions on drinking and driving.

The school also teaches a victim impact course, which consists of a panel of speakers who talk about how their lives were affected by drunk driving. The school did not have a record of Hogrefe taking the victim impact course.

### ***Fines and Fees***

At the sentencing hearing, the trial court imposed a restitution fine of \$10,000. The court stated the fine “can be deducted from wages.” The court did not orally impose a court-security fee (§ 1465.8) or a criminal conviction assessment fee (Gov. Code, § 70373), and the minute order from the hearing does not reflect the imposition of these fees. The abstract of judgment reflects that the court imposed a \$80 court-security fee (\$40 per

each conviction) and a \$60 criminal conviction assessment fee (\$30 per each conviction).

## **DISCUSSION**

### ***Change of Venue***

Hogrefe contends the trial court erred when it denied his change of venue motion because it was not reasonably likely he could receive a fair trial in Ventura County. We disagree because Hogrefe did not demonstrate that “a fair and impartial trial cannot be had” in Ventura County. (§ 1033, subd. (a).)

#### **1. Relevant Proceedings**

Before trial, Hogrefe filed a motion requesting a change of venue. He attached newspaper articles about the incident, articles about Kostiuchenko, blog posts, Facebook posts, other online comments, a death threat letter, and photographs of Kostiuchenko’s funeral and highway memorial signs dedicated to him. The online comments included threats and disparaging comments toward Hogrefe and defense counsel. Other comments were sympathetic to Hogrefe, including some that said the case was overcharged.

The court held a hearing on the venue motion in August 2016. A defense investigator testified that television and news media were at various court appearances. The investigator said that “[e]arly on in the case there was quite a bit more media presence” than at more recent hearings. He recalled there was a “heavy law enforcement presence” at Hogrefe’s bail review hearing.

The investigator testified that during a February 2015 hearing, he saw eight sheriff’s deputies in court wearing a pin that read, “YK 137,” in honor of Kostiuchenko. He saw other deputies in the community wearing similar pins and some who

had “YK 137” decals on their patrol cars. At some point before trial, deputies stopped wearing the pins and displaying the decals.

The investigator testified he saw photographs from Kostiuchenko’s funeral in November 2014. A portion of U.S. Highway 101 was closed that day for a motorcade escorting Kostiuchenko’s body. The investigator also attended an annual memorial ceremony in May 2015 at Ventura County’s government center. Several speakers talked about Kostiuchenko and his death. His name was engraved on a memorial, which lists names of Ventura County law enforcement officials who have died. The memorial is located on the courthouse grounds. Highway memorial signs dedicated to Kostiuchenko were also placed on the northbound Lewis Road exit and southbound Las Posas Road exit of U.S. Highway 101.

In opposition to the venue motion, the prosecution submitted evidence that Ventura County was the 12th largest county in California, with a population of 846,000 people. At the conclusion of the hearing, the court denied the motion without prejudice.

In September 2016, jury selection commenced. The trial court instructed potential jurors that during trial, including jury selection, they must not talk or consult with any person or media source about the case. The court instructed that the jurors “must not allow anything that happens outside of the courtroom to affect your decision,” and they must refrain from any media or internet source that has commentary or reporting on the case. The jurors were also instructed not to look at or focus on the highway memorial signs. The court requested that witnesses from the sheriff’s department wear civilian clothes at trial. It

also ordered court staff and witnesses not to wear the “YK 137” pin, a black band on their badge, or any other commemorative markings.

More than 200 potential jurors were brought into the courtroom. After some jurors were excused for hardship, the remaining jurors were asked to complete a questionnaire,<sup>2</sup> which, among other things, assessed their exposure to pretrial publicity. About 43 percent of the prospective jurors who completed the questionnaire said they heard or read about the case.

The court excused certain jurors based on their answers to the questionnaire, and about 78 jurors remained for voir dire. Sixty-four jurors were questioned.

On voir dire, four of the sworn jurors said they never heard about the case. All of the sworn jurors who said they had heard about the case described only general knowledge, and their information was mostly from 2014. None of them said they followed the case in the media.

Seven of the sworn jurors said they lived in cities south of the courthouse. Of these jurors, most used U.S. Highway 101 to get to the courthouse and would drive by the Lewis Road and/or the Las Posas Road exits. Only three or four jurors said they saw the highway memorial signs dedicated to Kostiuhenko, and one said she also saw “homemade” roadside memorials around the time the crime occurred. Two of these jurors said they did not pay attention to the memorials. None of these jurors said the memorials impacted them in any way.

Hogrefe renewed his motion for a change of venue during jury selection proceedings, and the court held a hearing

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<sup>2</sup> The questionnaire is not part of the record on appeal.

after the jury was selected but before they were sworn. Hogrefe submitted additional evidence of recent pretrial publicity and pictures of the highway memorial and another flag memorial. The trial court denied the motion. The court noted that many of the jurors who had a “strong reaction” to the charge were “weeded out” by stipulations and peremptory challenges. Similarly, any jurors who had “strong reactions” to the crime scene, the memorial sign, or publicity were “weeded out.” The court also noted that the jurors who heard about the case only had vague recollections from years ago.

## **2. Analysis**

On the defendant’s motion, the court must order a change of venue when “it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county.” (§ 1033, subd. (a).) The defendant challenging the denial of a change of venue has the burden to prove both “error and prejudice, that is, that it was not reasonably likely the defendant could receive a fair trial at the time of the motion, and that it is reasonably likely he did not in fact receive a fair trial.’ [Citation.]” (*People v. Rices* (2017) 4 Cal.5th 49, 72 (*Rices*)). We accept the trial court’s factual findings that are supported by substantial evidence, but we review de novo the court’s determination whether it was reasonably likely the defendant could and did receive a fair trial in the county. (*Ibid.*)

In deciding whether to change venue, the trial court considers: (1) the nature and gravity of the offense, (2) the nature and extent of media coverage, (3) the size of the community, (4) the defendant’s status within the community, and (5) the victim’s prominence. (*Rices, supra*, 4 Cal.5th at p. 72.) The court considers the totality of circumstances, and no one

factor is dispositive. (*People v. Mackey* (2015) 233 Cal.App.4th 32, 75-76 (*Mackey*).)

Here, the totality of the circumstances weighs against a change of venue. First, the nature and gravity of the offense did not necessitate a change of venue. The “nature” of the crime is determined by ““peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community.”” (*Mackey, supra*, 233 Cal.App.4th at p. 76.) The “gravity” of the crime “takes [into] account [the] seriousness of the crime “in the law” and the “possible consequences to an accused in the event of a guilty verdict.” [Citation.]” (*Ibid.*) Although Hogrefe was charged with second degree murder, the case “lacked ‘the sensational overtones of other killings that have been held to require a change of venue, such as an ongoing crime spree, multiple victims often related or acquainted, or sexual motivation.’ [Citation.]” (*People v. Fauber* (1992) 2 Cal.4th 792, 818 (*Fauber*) [no change of venue in a capital murder case]; see also *Mackey*, at p. 76 [no change of venue where multiple murders were “not particularly vulgar, gruesome, or brutal in nature”].) The most sensational aspect of the case was that the victim was a law enforcement officer. We consider the victim’s prominence below.

Second, the nature and extent of the media coverage did not require a change of venue. Hogrefe presented evidence of extensive pretrial publicity of the case, but most of it occurred near the time of the crime and greatly diminished over the two years before trial. (See *Rices, supra*, 4 Cal.5th at p. 73. [two and a half years between the arrest and the trial “blunted the publicity’s prejudicial impact” where most of the publicity occurred around the time of the crimes].) Media coverage

renewed once the trial date approached, but the more recent articles focused mostly on pretrial proceedings such as the denial of the venue motion and contained only general information about the case.

Moreover, the news coverage of the case appeared to be straightforward, factual, and unbiased. (*People v. Rountree* (2013) 56 Cal.4th 823, 838 (*Rountree*); *Rices, supra*, 4 Cal.5th at p. 73 [“generally factual and noninflammatory reporting” is not “necessarily prejudicial”].) The news articles did not report allegations as facts. They referred to Hogrefe as the “accused” and stated that it was “alleged” or “suspected” that he struck Kostiuchenko with his car. (See *Rices*, at p. 73 [articles referring to defendant as the “accused” was factual and unbiased].) Also, the reported facts were not contested at trial (i.e., Hogrefe’s BAC was over the limit; he struck Kostiuchenko; he fled the scene). (See *ibid.* [publicity describing the crime was not prejudicial where the defendant did not contest the facts reported].)

We give “little weight” to the social media and online comments Hogrefe presented as evidence because they are “anecdotal evidence” that do not reflect the consciousness and sentiment of the public at large. (*Mackey, supra*, 233 Cal.App.4th at p. 66, fn. 13.) It is unclear whether the commenters or readers were residents of Ventura County. Moreover, the comments were not uniformly negative, as some were sympathetic to Hogrefe.

Third, the size of Ventura County weighs against a change in venue. A larger population dilutes the impact of adverse publicity. (*Mackey, supra*, 233 Cal.App.4th at p. 80.) At the time of trial, Ventura was the 12th largest county in California, with a population of 846,000 people. In *Fauber, supra*, 2 Cal.4th at page 818, our Supreme Court determined that

the size of Ventura County was a factor weighing against a change of venue. At that time, Ventura was the 13th largest county with a population of 619,300. (*Ibid.*)

Hogrefe contends we should also consider the locations of four major population centers (Camarillo, Simi Valley, Moorpark, and Thousand Oaks) when evaluating this factor. He contends that because these four cities lie south of the courthouse, a majority of jury members would see the highway memorials during their commute to the courthouse. However, the record reflects the jury was not impacted or biased by the highway memorial. The trial court also instructed the jurors not to look at the memorial if they drive by it. We presume the jury understood and followed the instruction. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336.)

The fourth and fifth factors regarding the defendant's and victim's status within the community do not compel a change of venue. Hogrefe "had no particular status in the community before the charged crimes." (*Mackey, supra*, 233 Cal.App.4th at p. 82.) Before the incident, Kostiuhenko was also not well known in the community. Because of his profession as a law enforcement officer, there was heavy publicity, much of which portrayed him as a "hero." However, whatever prominence he gained in Ventura County "would have become apparent no matter in which venue [the] defendant was tried." (*Mackey, supra*, 233 Cal.App.4th at pp. 82-83 [the trial "would have aroused jurors' discomfort upon learning that a journalist was killed because he uncovered a controversial story, no matter where the case was tried"].) To the extent that Hogrefe was portrayed as an "anti-hero" by the media, whatever notoriety he

gained would also have arisen regardless of the venue. (*Id.* at p. 83.)

Hogrefe does not show a reasonable likelihood that he received an unfair trial. (*Rices, supra*, 4 Cal.5th at p. 72.) Here, the trial court used a comprehensive vetting process: selection from a large venire of prospective jurors, a lengthy questionnaire that “weeded out” apparent bias, and a thorough voir dire with questions about pretrial publicity exposure. (See *Mackey, supra*, 233 Cal.App.4th at p. 93 [a large venire, a questionnaire targeting potential bias based on pretrial publicity, a thorough voir dire, and in camera examinations demonstrated the trial court’s “comprehensive approach” to the venue motion].) The jurors who said they heard about the case recalled only vague and general information from two years earlier. (See *Fauber, supra*, 2 Cal.4th at p. 819 [no prejudice where jurors had “minimal exposure” to media coverage and only recalled seeing “a headline or part of an article” about the case]; *People v. Proctor* (1992) 4 Cal.4th 499, 527 (*Proctor*) [jurors had “minimal pretrial exposure” that “took place during a period well before commencement of the trial”].) None of the jurors reported seeing online comments or blog posts that disparaged Hogrefe or the defense counsel; nor did they see or hear news reports regarding plea negotiations or other proceedings that influenced their deliberations.

The record does not show the jury was biased by media coverage or by the memorials or dedications in Kostiuchenko’s honor. Only three or four jury members recalled seeing the highway memorials. Of those jurors, two did not pay attention to them and none of jurors said it impacted them. One juror saw homemade memorials around the time of the crime, but

she did not say it impacted her. None of the jurors said they saw other commemorative dedications for Kostiuchenko such as the “YK 137” pins. Nothing in the record suggests the jury was biased by the publicity in this case. (*Rices, supra*, 4 Cal.5th at p. 75; *Fauber, supra*, 2 Cal.4th at p. 819.)

Nothing in the record shows that any of the jurors formed opinions based on the pretrial publicity. Rather, they said they would be fair and impartial and base their verdict on the evidence presented at trial. (See *People v. Johnson* (2015) 60 Cal.4th 966, 983 [no prejudice “in fact” where juror assured they could put aside any pretrial publicity and decide the case on the evidence]; *Proctor, supra*, 4 Cal.4th at pp. 527-528 [no prejudice where jurors stated on voir dire that they would put aside any prior knowledge of the case].)

The totality of all the factors weighs against a change of venue. Hogrefe does not show there was a reasonable likelihood that he could not, or did not, have a fair and impartial trial in Ventura County. (§ 1033, subd. (a).) The venue motion was properly denied.

### ***Implied Malice***

Hogrefe argues the murder conviction must be reversed because there was insufficient evidence he acted with implied malice. We disagree because substantial evidence supports the jury’s finding of implied malice.

We review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence to support the conviction. (*People v. Avila* (2009) 46 Cal.4th 680, 701 (*Avila*).) To sustain a second degree murder conviction, the prosecution must prove beyond a reasonable doubt the defendant acted with express or implied

malice. (§§ 187, 188.) Malice is implied “when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life.” (*People v. Watson* (1981) 30 Cal.3d 290, 296 (*Watson*).)

“A person who, knowing the hazards of drunk driving, drives a vehicle while intoxicated and proximately causes the death of another may be convicted of second degree murder under an implied malice theory.” (*People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1112, disapproved on other grounds in *People v. Hicks* (2017) 4 Cal.5th 203, 213.) Courts have identified the following factors as sufficient to support a drunk driving second degree murder conviction under the implied malice theory: (1) a BAC above 0.08 percent, (2) a predrinking intent to drive, (3) knowledge of the hazards of driving while intoxicated, and (4) highly dangerous driving. (*Id.* at p. 1114; *Watson, supra*, 30 Cal.3d at pp. 300-301.)

Sufficient evidence supports all four factors. First, Hogrefe drank at least eight beers, which was enough to raise his BAC to three times the legal limit (0.25 percent). Second, Hogrefe drove alone to the sports bar, which shows his predrinking intent to drive his car home. (*Watson, supra*, 30 Cal.3d at p. 300 [that the defendant drove to the bar shows that “he must have known that he would have to drive it later”].)

Third, the evidence overwhelmingly shows that Hogrefe had knowledge of the dangers of drinking and driving. Hogrefe had two prior DUI arrests—one when he was a juvenile and the other in 2013 in Nevada. (*People v. Autry* (1995) 37 Cal.App.4th 351, 359 [prior DUI convictions were sufficient to show awareness of the dangers of drunk driving].) Moreover, his Nevada DUI resulted in an accident that caused another car to

lose control and caused his car to roll over. (*People v. David* (1991) 230 Cal.App.3d 1109, 1115 [prior DUI's which resulted in a car accident demonstrated the dangers of drunk driving "even more vividly"].) Hogrefe attended an online DUI course, which covered the dangers of drinking and driving. He admitted he learned how driving under the influence could "kill," "hurt," or "ruin people's lives." (See *People v. Murray* (1990) 225 Cal.App.3d 734, 745 [evidence that the defendant took DUI education courses supported that he was aware of the dangers of drunk driving].) He watched a video of a victim impact panel and admitted that it "stuck with" him. (See *People v. Wolfe* (2018) 20 Cal.App.5th 673, 683 (*Wolfe*) [previous attendance at a victim impact panel supported a finding that the defendant was subjectively aware of the dangers of drunk driving].)

Hogrefe's actions also showed that he was subjectively aware of the dangers of drinking and driving. When the bartender asked whether he was driving home, Hogrefe reacted as if it was a "stupid" question and said he was going to walk. Hogrefe previously made arrangements for a ride home when he went out drinking. (See *Wolfe, supra*, 20 Cal.App.5th at p. 683 [previous calls to taxi services showed his knowledge of the dangers of drinking and driving].) He admitted to the officers that he considered other options, but decided to "chance it" by driving. Several text messages show that he knew drinking and driving was dangerous. And Hogrefe admitted that he knew that drinking and driving was "not safe" and that it could lead to hurting people. He said that in the past, he feared he might kill someone if he did so.

Fourth, Hogrefe drove dangerously on the night of the incident. Hogrefe admitted that he felt the effects of alcohol

and that he became “mesmerized” by the police lights and “gravitated” towards them “even though he knew he shouldn’t.” Hogrefe came within six inches of Valdez’s patrol car, and then struck Kostiuhenko and his car. Hogrefe did not stop or brake after hitting Kostiuhenko, but accelerated toward the highway. This shows that he acted with conscious disregard for human life. (See *Wolfe, supra*, 20 Cal.App.5th at p. 683 [sufficient evidence of conscious disregard for human life where the defendant fled the crime scene after causing an accident].) Based on all four factors, a jury could reasonably conclude that Hogrefe acted with implied malice.

### ***Juvenile Prior Offense***

Hogrefe argues the trial court erred when it admitted his pretrial statements regarding his juvenile DUI offense. We disagree.

Hogrefe forfeited this claim because he did not specifically object on the grounds that he now asserts on appeal, i.e., that the evidence was not relevant to show knowledge. (Evid. Code, § 353; *People v. Brooks* (2017) 3 Cal.5th 1, 42.) Instead, he objected to the admission of those statements on the grounds that they were involuntary and prejudicial.

In any event, the court did not err when it admitted his statements. Evidence of a prior offense is not admissible to prove conduct on a specific occasion, but may be admitted to establish knowledge. (Evid. Code, § 1101, subd. (b).) The probative value of the evidence must not be outweighed by the probability that its admission would result in undue prejudice. (Evid. Code, § 352; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) We review the trial court’s admission of Hogrefe’s statements

regarding his juvenile offense for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

The trial court did not abuse its discretion because Hogrefe's statements regarding his juvenile offense were relevant to prove he knew driving under the influence was dangerous. (See *People v. Garcia* (1995) 41 Cal.App.4th 1832, 1849 [prior DUI arrest admissible to show the defendant knew a DUI was dangerous], disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn.3.) Moreover, the probative value of the evidence was not outweighed by the risk of undue prejudice because his prior offense was less serious than the current offense. (Evid. Code, § 352.)

Hogrefe contends the trial court violated his due process rights when it admitted evidence of his juvenile offense because it did not consider the differences between juveniles and adults. He cites several Supreme Court cases that acknowledge that juvenile offenders are less culpable than adult offenders. (*Roper v. Simmons* (2005) 543 U.S. 551, 572; *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460.) But the evidence was not admitted to show his culpability. Rather, it was admitted to show Hogrefe's knowledge. Moreover, juvenile prior offenses may be admitted pursuant to Evidence Code section 1101, subdivision (b). (See *People v. Lindberg* (2008) 45 Cal.4th 1, 13-14.)

Hogrefe's argument that juveniles do not appreciate the consequences of his DUI arrest or "learn the dangers of repeating that event" is not persuasive. Hogrefe was 17 years old at the time of his prior offense. He was old enough to appreciate the dangers of drinking and driving and the laws prohibiting it. There was no error in admitting the juvenile offense evidence.

### ***Youth Offender Parole Hearing***

Hogrefe contends, and the Attorney General agrees, that a limited remand is required to allow the parties to present evidence relevant to a future youth offender parole hearing because he was 25 years old when he committed the offense. (*People v. Franklin* (2016) 63 Cal.4th 261, 283 (*Franklin*).) We agree.

Section 3051 requires the Board of Parole Hearings to conduct a “youth offender parole hearing” during the 20th year of the offender’s incarceration if the controlling offense carried a term of 25 years to life or less. (§ 3051, subds. (a)(1) & (b)(2).) Both the youth offender and the prosecution may place on the record information regarding the offender’s “characteristics and circumstances at the time of the offense” such as statements from “[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime.” (§ 3051, subd. (f)(2); *Franklin, supra*, 63 Cal.4th at pp. 283-284.)

When the trial court sentenced Hogrefe, section 3051 applied to offenders who were 23 years or younger at the time of their controlling offense. Effective January 2018, section 3051 was amended to raise the age of eligible offenders to 25 years. (§ 3051, subd. (a)(1), amended by stats. 2017, ch. 675, § 1.) Section 3051 and its amendments apply retroactively to offenders who were otherwise eligible on the date of their offense. (*People v. Perez* (2016) 3 Cal.App.5th 612, 618-619.)

Hogrefe was 25 years old at the time he committed the offense. The record shows that he did not have sufficient opportunity to present evidence relevant to a future parole

hearing. (*Franklin, supra*, 63 Cal.4th at p. 284.) Therefore, we will remand the case to afford him that opportunity. (*Ibid.*)

### ***Fines and Fees***

Hogrefe contends the court facilities fees of \$80 (§ 1465.8) and the criminal conviction assessments of \$60 (Gov. Code, § 70373) must be reversed because they were imposed without determining his ability to pay them, and the restitution fine of \$10,000 (§ 1202.4) must be stayed until he has demonstrated his ability to pay it. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1172-1173 (*Dueñas*).) The Attorney General contends Hogrefe forfeited these claims.

#### **1. Fees and Assessments**

Although Hogrefe did not object to any of the fines and fees, he did not forfeit his claim on the court facilities fees (§ 1465.8) and criminal conviction assessments (Gov. Code, § 70373). The record reflects that he did not have the opportunity to object to these fees because the trial court did not orally impose them at the sentencing hearing. (See *People v. Scott* (1994) 9 Cal.4th 331, 356.)

At the time the fees and assessments were imposed, *Dueñas, supra*, 30 Cal.App.5th 1157 had not been decided. In *Dueñas*, the Court of Appeal held that due process requires a trial court to conduct an ability to pay hearing before imposing court facilities fees (§ 1465.8) and criminal conviction assessments (Gov. Code, § 70373). Because no California court prior to *Dueñas* held it was unconstitutional to impose these fees and assessments without an ability to pay determination, Hogrefe did not forfeit this claim. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490-491 (*Castellano*).)

Consistent with *Dueñas*, we conclude that remand is required to give Hogrefe the opportunity to request a hearing and present evidence demonstrating his inability to pay. (*Castellano, supra*, 33 Cal.App.5th at p. 491.)

## **2. Restitution Fine**

Unlike the court facilities fees and criminal conviction assessments, Hogrefe had the opportunity to object to the \$10,000 restitution fine at the sentencing hearing, and he was required to do so to preserve the claim on appeal. Under section 1202.4, subdivision (d), if the restitution fine is in excess of the minimum fine, “the court shall consider any relevant factors, including, . . . the defendant’s inability to pay. . . . A defendant shall bear the burden of demonstrating his or her inability to pay.”

Here, the court orally imposed the maximum restitution fine at the sentencing hearing. In so doing, the court considered Hogrefe’s ability to pay and concluded the fine “can be deducted from wages.” Because Hogrefe did not object, he forfeited this claim. (See *People v. Gamache* (2010) 48 Cal.4th 347, 409 [forfeiture where the defendant did not object to the maximum restitution fine at the sentencing hearing].)

### **DISPOSITION**

We remand the case to afford the parties the opportunity to make a record relevant to Hogrefe's future parole hearing (Pen. Code, § 3051) and to give Hogrefe the opportunity to request a hearing on his ability to pay the court facilities fees and criminal conviction assessments. Hogrefe has the right to assistance of counsel at the remand hearing, and, unless he chooses to waive that right, the right to be present. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Matthew P. Guasco, Judge  
Superior Court County of Ventura

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